

# RTI AND THE LAW

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The professional literature concerning response to intervention (RTI) is extensive and is not limited to its use for identification of students with specific learning disability (SLD). However, it lacks a comprehensive and objective compilation of the pertinent legal sources, which are exclusive to SLD identification.<sup>1</sup>

This document provides an annotated synthesis of the law specific to RTI in the context of eligibility for special education under the Individuals with Disabilities Education Act (IDEA) and corollary state statutes and administrative codes. “Law” in this context consists of legislation, regulations, case law,<sup>2</sup> and—at the outermost—margin, agency interpretations.<sup>3</sup> On the other hand, state guidelines, with the exception of policies formally adopted by the state board of education, are not within the scope of this synthesis.<sup>4</sup> For each of the successive sources of law, this document provides the key points along with the specific citations.

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<sup>1</sup> Instead, the pertinent literature is largely limited to skewed selections and interpretations of the law. See, e.g., the articles reviewed in Perry A. Zirkel, *Response to Intercontention: A Legal Discrepancy Analysis*, 60 THE SCH. PSYCHOLOGIST 118 (2006).

<sup>2</sup> “Case law” in this context refers to hearing/review officer decisions published in the Individuals with Disabilities Education Law Reporter (IDELR) in addition to court decisions available in any of the generally available legal databases.

<sup>3</sup> The administering agency for the IDEA is the U.S. Department of Education, which successively includes the Office of Special Education and Rehabilitations Services (OSERS) and, most specifically in relation to the IDEA, the Office of Special Education Programs (OSEP). Although these agency interpretations do not have binding effect, hearing/review officers and courts often accord them persuasive weight. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2003).

<sup>4</sup> For an explanation of this boundary, see, e.g., Perry A. Zirkel & Lisa B. Thomas, *State Laws for RTI: An Updated Snapshot*, 42 TEACHING EXCEPTIONAL CHILD. 56 (Jan./Feb. 2010). For a follow-up study that analyzes not only the applicable state laws but also the pertinent state guidelines, see Perry A. Zirkel & Lisa B. Thomas, *State Requirements and Recommendations for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (Sept./Oct. 2010) (hereinafter referred to as “Zirkel & Thomas II”).

## I. IDEA Legislation

The 2004 amendments of the IDEA, which went into effect on July 1, 2005, provided that for SLD identification states may no longer require severe discrepancy and must permit school districts to use “a process that determines if the child responds to scientific, research-based intervention,” i.e., RTI.<sup>5</sup>

Thus, states had a choice of permitting or prohibiting severe discrepancy and permitting or requiring RTI.

## II. IDEA Regulations

The 2006 IDEA regulations, which went into effect on October 13, 2006, required states to choose among these options for SLD identification:

- severe discrepancy: permit or prohibit
- RTI: permit or require
- “other alternative research-based procedures”: permit or require<sup>6</sup>

The reference points for RTI appear to be “age or State-approved grade-level standards.”<sup>7</sup>

Subject to confusion, the regulations separately included this provision as an alternative to RTI: “The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of [SLD].”<sup>8</sup>

The regulations further required the district “promptly” request consent for an evaluation if the child has not made “adequate progress” after an “appropriate period” of appropriate instruction delivered by qualified personnel in regular education settings.<sup>9</sup>

Finally, the regulations required specified considerations as part of the evaluation, including “data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents.”<sup>10</sup>

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<sup>5</sup> 20 U.S.C. § 1414(b)(6) (2008).

<sup>6</sup> 34 C.F.R. § 300.307(a) (2008).

<sup>7</sup> *Id.* § 300.309(a)(2)(i).

<sup>8</sup> *Id.* § 300.309(a)(2)(ii).

<sup>9</sup> *Id.* § 300.309(c)(2).

<sup>10</sup> *Id.* § 300.309(b).

### III. OSEP Policy Interpretations<sup>11</sup>

In the commentary accompanying the 2006 regulations,<sup>12</sup> OSEP provided these interpretations:

- For the third, research-based alternative, OSEP provided these examples for a state’s choices: 1) “identify children based on absolute low achievement and consideration of exclusionary factors as one criterion for eligibility” or 2) “combine features of different models for identification.”
- For State-approved grade-level standards, OSEP pointed specifically to NCLB assessments, not standardized norm-references test results:
 

State-approved standards are not expressed as ‘norms’ but represent benchmarks for all children at each grade level. The performance of classmates and peers is not an appropriate standard if most children in a class or school are not meeting State-approved standards....The reference to ‘State-approved grade-level standard’ is intended to emphasize the alignment of the Act and the [NCLB], as well as to cover children who have been retained in a grade, since age level expectations may not be appropriate for these children.
- For the prerequisite consideration to avoid the suspected SLD being attributable to inadequate instruction in reading and math, OSEP concluded that its original proposal for “*high quality, research-based* instruction exceeds statutory authority” [emphasis added]; instead, the relevant regulation requires that the evaluation team consider data that the child received “appropriate instruction” in regular education prior to or as part of the referral process.
- For SLD identification of parentally placed private school children, OSEP opined: “The group making the eligibility determination for a private school child for whom data on the child’s response to appropriate instruction are not available may need to rely on other information to make their determination, or identify what additional data are needed to determine whether the child is a child with a disability.”

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<sup>11</sup> The coverage here is limited to generally applicable agency interpretations role to RTI, thus not including those specific to particular role groups. See, e.g., Letter to Clarke, 51 IDELR ¶ 223 (OSEP (2008) (speech pathologists); Letter to Gorin, 48 IDELR ¶ 104 (OSEP 2006) (school psychologists). Similarly, it does not extend to those specific to severe discrepancy. See, e.g., Letter to Anonymous, 51 IDELR ¶ 252 (OSEP 2008).

<sup>12</sup> 71 Fed. Register 46,540 *et seq.* (Aug. 14, 2006).

In the subsequent policy letters, OSEP has added these clarifications:

- For core characteristics of RTI, OSEP listed: 1) “high quality, research-based instruction” in general education, 2) continuous progress monitoring, 3) screening for academic and behavior problems, and 4) multiple tiers of progressively more intense instruction.<sup>13</sup>
- For adoption of RTI as mandatory, OSEP advised in favor of statewide and district-wide uniformity, respectively.<sup>14</sup> However, where both state law and local policy permit RTI, “a school would not have to wait until RTI is fully implemented in all schools in the LEA before using RTI as part of the identification of SLD.”<sup>15</sup>
- RTI is only one part of a comprehensive evaluation.<sup>16</sup>
- States may permit any combination of the three options, or methods.<sup>17</sup>
- The IDEA regulatory reference to “pattern of strengths and weaknesses”<sup>18</sup> refers to the permissible methods other than RTI, i.e., severe discrepancy and the third, research-based alternative.<sup>19</sup>
- For the duration of RTI and its interplay with the required evaluation, OSEP declined to define “an appropriate period” or “adequate progress.”<sup>20</sup>

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<sup>13</sup> Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007); *see also* Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011); Memorandum to Chief State School Officers, 51 IDELR ¶ 49 (OSEP 2008). Whether intended as a distinction, the second policy document referred to the first characteristic in terms of “high quality, evidence-based instruction.” The professional literature has recognized an additional core characteristic—**fidelity**.

<sup>14</sup> Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007); *see also* Letter to Anonymous, 49 IDELR ¶ 106 (OSEP 2007).

<sup>15</sup> Letter to Massanari, 108 LRP 2644 (OSEP 2007); Letter to Cernosia, 108 LRP 2652 (OSEP 2007); *see also* Memorandum to State Directors of Special Education, 111 LRP 4677 (OSEP 2011).

<sup>16</sup> Letter to Zirkel, 47 IDELR ¶ 268 (OSEP 2007); Letter to Prifitera, 48 IDELR ¶ 163 (OSEP 2007); *cf.* Letter to Copenhaver, 108 LRP 16368 (OSEP 2007) (except for rare exceptions, review of existing data would be insufficient).

<sup>17</sup> Letter to Zirkel, 48 IDELR ¶ 192 (OSEP 2007).

<sup>18</sup> See *supra* note 8 and accompanying text.

<sup>19</sup> Letter to Zirkel, 49 IDELR ¶ 50 (OSEP 2008).

<sup>20</sup> Questions and Answers on Response to Intervention (RTI) and Early Intervening Services (EIS), 47 IDELR ¶ 196 (OSERS 2007).

- Early intervening services funds may be used for RTI provided that they serve “nondisabled students in need of additional academic or behavioral support and supplement, not supplant, other funds used to implement RTI.”<sup>21</sup>
- For the expedited evaluation required for “deemed to know” children who are subject to disciplinary changes in placement, information from the RTI process may be used, but where the child had not participated in the RTI process prior to the consent for evaluation, the district “would need to rely on other assessment tools and strategies to ensure that the evaluation can be conducted in an expedited manner.”<sup>22</sup>
- If a district used the RTI process and, in disagreement with it, the parent obtained an independent educational evaluation (IEE), the district is not required to reimburse the parents for the IEE because reimbursement is only possible when the parents disagree with a completed evaluation.<sup>23</sup>
- The IDEA does not require parental consent for RTI to the extent that it constitutes screening prior to the evaluation process.<sup>24</sup>
- RTI may not be used to delay or deny an evaluation of a child suspected of having a disability.<sup>25</sup>
- If a parent requests an evaluation of a child who is in the district’s RTI process, the district must either 1) proceed to obtain consent within a reasonable period and complete the evaluation within the regulatory timeline, or 2) provide the parent with a written refusal explaining the basis for concluding that it lacks reason to suspect the child has a disability. The parent may challenge this refusal via a due process hearing.<sup>26</sup>
- If a private school refers a parentally placed child to the district of its location for an evaluation for suspected SLD and the district uses RTI for SLD identification, the district is not required to use RTI for the evaluation and must move forward to obtain parental consent and to complete the evaluation within 60 days thereafter.<sup>27</sup>

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<sup>21</sup> Memorandum to Chief State School Officers, 51 IDELR ¶ 49 (OSEP 2008).

<sup>22</sup> Letter to Combs, 52 IDELR ¶ 46 (OSEP 2008).

<sup>23</sup> Letter to Zirkel, 52 IDELR ¶ 77 (OSEP 2008).

<sup>24</sup> Letter to Torres, 53 IDELR ¶ 333 (OSEP 2009).

<sup>25</sup> Memorandum to State Directors of Special Education, 56 IDELR ¶ 50 (OSEP 2011).

<sup>26</sup> *Id.*; see also Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011).

<sup>27</sup> Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011); cf. Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010) (same for referral from a Head Start program).

- SLD and, thus, RTI, generally are generally not applicable to Head Start and other preschool children with disabilities.<sup>28</sup>
- The IDEA regulations’ requirement for documentation of a child’s behavior (as well as academic performance) based on an observation is a separable part of the SLD identification process; “therefore, it would be inappropriate to assume that an adopted RTI process must be based on behavior and/or that this [RTI] process extends to other classifications more closely connected to behavior.”<sup>29</sup>
- The IDEA does not address the use of an RTI model for children suspected of having disabilities other than SLD, which is a matter for states.<sup>30</sup>

#### IV. State Laws

As of May 31, 2010, approximately 13 states (e.g., Delaware, Florida, Illinois, New Mexico, New York, and West Virginia)<sup>31</sup> had adopted RTI as mandatory for SLD identification at least in part (i.e., for reading and/or for specified grades), with varying deadlines. Conversely, the vast majority of states have elected to permit both RTI and severe discrepancy, thereby delegating the choice to the school district. Many states have issued guidelines—as distinct from legislation or guidelines—that provide operational details for implementation. For example, in some of the permissive states (e.g., Pennsylvania), the state education agency requires school districts to obtain approval for their particular plan for RTI.<sup>32</sup>

Additional examination of state laws and guidelines reveals that 1) the state laws often provide general education interventions but not in coordination with the RTI provisions; 2) more than two thirds of the states provide for a dual model of RTI, i.e., the behavioral as well as the academic dimension, but largely via guidelines; 3) less than half of the states specify an individual intervention plan as part of their RTI provisions; and 4) only a handful of states have extended RTI for classifications beyond SLD, with Louisiana the only one to do so generically thus far.<sup>33</sup>

<sup>28</sup> Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010).

<sup>29</sup> Letter to Zirkel, 56 IDELR ¶ 140 (OSEP 2011).

<sup>30</sup> Letter to Brekken, 56 IDELR ¶ 80 (OSEP 2010).

<sup>31</sup>The only state that had not finalized its official choice by that date was Wisconsin. *Id.* More recently, Wisconsin finalized its regulation, becoming the 14<sup>th</sup> state to mandate RTI (after a three-year transition period). See <http://www.dpi.state.wi.us/sped/ld.html> (“final rule”).

<sup>32</sup> Zirkel & Thomas II, *supra* note 4.

<sup>33</sup> Perry A. Zirkel, *State Laws and Guidelines for RTI: Additional Implementation Features*, 39 COMMUNIQUÉ 30 (May 2011). For a more general example of such “beyond” features, which is behavior, see JEFFREY SPRAGUE ET AL., *RTI AND BEHAVIOR: A GUIDE TO INTEGRATING BEHAVIORAL AND ACADEMIC SUPPORTS* (2008).

## V. Case Law

### A. SLD Case Law Until Mid-2006

A comprehensive compilation of approximately 90 hearing/review officer and court decisions from 1980 to mid-2006 specific to SLD identification found that districts won approximately 80% of the cases in terms of the child not being eligible, with the most frequent decisional factors being severe discrepancy ( $n = 68$ ) or the need for special education ( $n = 31$ ).<sup>34</sup>

### B. SLD Case Law After Mid-2006

1. The same trend continued in the 18 decisions from mid-2006 to early 2010.<sup>35</sup>
2. One or two cases mentioned RTI peripherally as permissive under state law while using severe discrepancy to determine SLD eligibility.<sup>36</sup>
3. The rare cases decided thus far, at least in part based on RTI, reflect confusion and deference rather than the strict potential standards<sup>37</sup> for reviewing district determinations of non-eligibility for SLD—see the table on the next page.

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<sup>34</sup> PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* (2006) (available from the Council for Exceptional Children – [www.ced.sped.org](http://www.ced.sped.org)).

<sup>35</sup> Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability for Special Education Eligibility*, 42 *TEACHING EXCEPTIONAL CHILD*. 62 (May/June 2010).

<sup>36</sup> See, e.g., *M.B. v. S. Orange-Maplewood Bd. of Educ.*, 55 IDELR ¶ 18 (D.N.J. 2010); *cf. Deer Creek-Mackinaw Cmty. Unit Sch. Dist. 701*, 54 IDELR ¶ 138 (Ill. SEA 2010) (mentioning unconvincing RTI program as a peripheral consideration in child find violation). Another case reflected confusion between RTI and the separable IDEA concepts of peer-reviewed research (PRR) and scientific, research-based (SBR). See, e.g., *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 831 (N.D. Ill. 2009) (deferring to hearing officer’s finding that parent’s experts’ “predictions were ‘not backed up by scientifically researched data ... [or] based on the student’s response to intervention’”). For an explanation of these terms, see, e.g., Perry A. Zirkel, *A Legal Roadmap of SBR, PRR and Related Terms under the IDEA*, 40 *FOCUS ON EXCEPTIONAL CHILD*. 1 (Jan. 2008).

<sup>37</sup> These standards, posed here as potential questions upon cross examination, include the following:

- Is the instruction provided universally in general education, at least in the eight enumerated areas (e.g., reading comprehension, written expression, and math problem solving) supported by “scientific-based research,” as defined in the IDEA?
- Similarly, in general education universally from K to 12, do all the teachers, at each of the tiers, provide continuous progress monitoring?
- How do your policies and procedures define the duration of each tier and, most importantly, the specific discrepancy from State-approved grade level standards for each of the eight enumerated areas for movement to the next tier?

**Table: RTI Case Law to Date<sup>i</sup>**

<b>RTI in General</b>		<b>Case 1<sup>ii</sup></b>	<b>Case 2<sup>iii</sup></b>	<b>Case 3<sup>iv</sup></b>	<b>Case 4<sup>vi</sup></b>	<b>Case 5<sup>vii</sup></b>
State Law:		permissive for SLD	mandatory for SLD (and MR)	mandatory for SLD	mandatory for SLD	permissive for SLD
<b>Purpose:</b>	<b>SLD identification</b>	SLD identification	ED or OHI <sup>viii</sup> (child find) <sup>ix</sup>	MR or OHI <sup>x</sup>	hearing impairment (child find)	SLD identification
<b>Features:</b>	<ul style="list-style-type: none"> <li>• universal SRBI<sup>xi</sup></li> </ul>					
	<ul style="list-style-type: none"> <li>• multiple tiers</li> </ul>			(yes) <sup>xii</sup>		
	<ul style="list-style-type: none"> <li>• CPM<sup>xiii</sup></li> </ul>		lack of written plan <sup>xiv</sup>	(yes) <sup>xv</sup>	(written plan) <sup>xvi</sup>	
	<ul style="list-style-type: none"> <li>• decision points<sup>xvii</sup></li> </ul>	high scores <sup>xviii</sup>				
<b>Outcome:</b>		school prevailed <sup>xix</sup>	parent prevailed <sup>xx</sup>	school prevailed <sup>xxi</sup>	parent prevailed <sup>xxii</sup>	district prevailed <sup>xxiii</sup>

### Notes for the Table

<sup>i</sup> The case coverage is limited to court decisions available in the Westlaw database and hearing/review officer decisions (designated by the acronym “SEA” due to the supervisory responsibility of the state education agency) published in the Individuals with Disabilities Law Reports (IDELR). Thus far, these cases are limited to the hearing/review officer level. The coverage does not extend to the SEA decisions in the less widely accessible LRP electronic database, Special Ed Connection<sup>®</sup>, which includes a recent ruling that, due to the child’s progress in the district’s RTI process, rejected a parent’s child find claim. Austin Indep. Sch. Dist., 110 LRP 49317 (Tex. SEA 2010). It also does not extend to Office for Civil Rights (OCR) letters of findings in response to parental complaints. For an example of an OCR letter finding a violation for not promptly providing a full psychoeducational evaluation upon reason to suspect eligibility during the RTI process, see Polk County (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).

The only published sources to date specific to RTI case law are neither comprehensive nor central. David W. Walker & David Daves, *Response to Intervention and the Courts: Litigation-Based Guidance*, 21 J. DISABILITY POL’Y STUD. 40 (2010); Mitchell L. Yell & David W. Walker, *The Legal Basis of Response to Intervention: Analysis and Implications*, 18 EXCEPTIONALITY 124 (2010); Mitchell Yell, Antonis Katsiyannis & James Collins, *Compton Unified School District v. Starvenia Addison: Child Find Activities and Response to Intervention*, 21 J. DISABILITY POL’Y STUD. 67 (2010). First, none of these three articles provides a careful analysis of the framework of relevant regulations and OSEP policy letters. Second and much more significantly, their case selection reflects fatal confusion. The first two, which are strikingly similar in their case coverage, erroneously equated RTI with prereferral interventions generally regardless of the IDEA disability classification and without concordance with the established core characteristics of RTI, thus mischaracterizing their entire sample of purported RTI cases. The third also fails to cite a case specific to RTI, instead relying on one child find case that stands out from the plethora of others only for an entirely different reason, which was the district’s attempted statutory defense. For the confusion that includes but extends beyond these articles, see generally Perry A. Zirkel, *RTI Confusion the Case Law and Legal Commentary*, \_\_ LEARNING DISABILITY Q. \_\_ (forthcoming).

<sup>ii</sup> High Tech Middle Media Arts Sch., 47 IDELR ¶ 114 (Cal. SEA 2007) (decided on 2/8/07).

<sup>iii</sup> Delaware Coll. Preparatory Acad., 53 IDELR ¶ 135 (Del. SEA 2009) (decided on 7/30/09). For a complaint resolution process, rather than hearing officer, decision that similarly found a child find violation based, in part, on the lack of RTI for a student ultimately classified as OHI, see Family Foundations Acad. Charter Sch., 54 IDELR ¶ 207 (Del. SEA 2010).

<sup>iv</sup> Citrus County Sch. Dist., 54 IDELR ¶ 40 (Fla. SEA 2009) (decided 11/24/09).

<sup>vi</sup> Meridian Sch. Dist. No. 223, 56 IDELR ¶ 30 (Ill. SEA 2010).

<sup>vii</sup> Joshua Indep. Sch. Dist., 56 IDELR ¶ 88 (Tex. SEA 2010).

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<sup>viii</sup> Delaware’s regulations require RTI for identification of not only children with SLD but also those with MR; however, they contain no such provision for identifying students in other disability classifications.

<sup>ix</sup> Presenting diagnoses of ADHD and ODD, the parent stipulated that the child did not have SLD. The hearing panel relied on evidence of severe and sustained behavioral problems to decide that the school’s failure to provide procedural safeguards, including notice and evaluation, violated the IDEA.

<sup>x</sup> The child had diagnoses of ADHD, bipolar disorder, and ODD; evidenced behavioral problems at home; was in remedial first grade after repeating kindergarten; and had been participating in RTI since kindergarten, most recently making slow by steady progress in reading (and w/o behavior problems) in Tier 3. The hearing officer recited the eligibility provisions in Florida law for MR and OHI, concluding that the district has 60 school days to complete its evaluation of the child.

<sup>xi</sup> SRBI = scientific, research-based interventions.

<sup>xii</sup> See *supra* note 6.

<sup>xiii</sup> CPM = continuous progress monitoring.

<sup>xiv</sup> The hearing panel rejected the school’s RTI defense, reasoning as follows:

RTI requires a written plan for a child with meetings to discuss the interventions and the child’s progress with respect to the interventions. Once a child fails to respond to one tier of interventions, additional meetings are held and new interventions are created [The school] had no record of such a plan for [the child].

Delaware’s regulations for RTI have no such requirement.

<sup>xv</sup> The child had a PMP (progress monitoring plan) for at least Tiers 1 and 2; the record did not include one for Tier 3, although the progress data were in evidence.

<sup>xvi</sup> The district team developed a written plan, although the hearing officer found its implementation to have been “questionable.” However, beyond this possibly related feature, there was no mention of continuous progress monitoring.

<sup>xvii</sup> Based on the professional literature, this phrase refers to the duration of and movement from each tier, including operationalization of the regulatory references to “[in]adequate progress” and “appropriate period.” See *supra* note 5 and accompanying text.

<sup>xviii</sup> Pointing to the commentary accompanying the 2006 IDEA regulations that identified the frame of reference as “State-approved grade-level standards, not abilities,” the hearing officer concluded:

In the instant case, there is no underachievement by Student, no failure to meet grade level standards, and no evidence of any research-based interventions attempted with Student. Because Student was getting As and Bs in all

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her classes and scored very high on the slate [sic] standardized testing, there would have been no reason for the school to have maintained records of such interventions to determine if the student had SLD using the RTI method. However, her opinion reflected confusion in at least two respects: 1) she accepted as an alternative, without providing any legal foundation, the premise that the IDEA, California law, or district policy required RTI; and 2) she concluded that “reading fluency ... is not sufficient to show that the Student has an SLD in the area of reading.”

<sup>xix</sup> After correctly concluding that California permits both the severe discrepancy and RTI approaches, the hearing officer ruled that the child no longer qualified as SLD under either one.

<sup>xx</sup> While declining to determine the child was eligible, the hearing panel ordered the district to provide a prompt comprehensive evaluation, IEE reimbursement, and approximately one semester of compensatory education services.

<sup>xxi</sup> The hearing officer concluded that prior to the parent’s request for an evaluation and an IEE during Tier 3, the district “had no reason to request consent to perform an IEE because [the child] is making progress in RTI, Tier 3, instruction.”

<sup>xxii</sup> The outcome was not based on RTI, at least with regard to the regulatory requirement for SLD identification. The hearing officer did not definitively address RTI in relation to SLD, merely citing the relevant state regulation and subsequently observing that the district had no reason to suspect SLD until the IEE, which was after the filing for the hearing.

<sup>xxiii</sup> The basis of this short decision was the hearing officer’s rather cryptic conclusion, without detailed fact finding or RTI examination, that “the RTI process was successful for the student.”